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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 1[redacted]153

TRUNKLINE GAS COMPANY,

Petitioner,

v.

HARDIN COUNTY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 1125

TRUNKLINE GAS COMPANY,

Petitioner,

v.

HARDIN COUNTY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENT

To the Honorable Supreme Court of the United States:

Respondent, HARDIN COUNTY, presents this Supplemental Brief in Opposition to Petitioner's Reply Brief.

I.

PETITIONER'S CONSTRUCTION RENDERS SECTION 2 OF THE ACT OF 1963 VOID

Avoiding traverse of the Brief in Opposition and relying solely upon Section 2 of the Act of 1963,[1] Petitioner's Reply Brief tacitly concedes the soundness of the holding of the

[1] Acts 1963, 58th Leg. p. 654, Ch. 240, quoted in Petitioner's Reply Brief, p. 2, and herein referred to as the "Act of 1963."

court below. The court below held that Respondent did not have power to contract to pay Petitioner the cost of casing pipelines in areas acquired to widen State highways. Urging the general rule that the Legislature of Texas may validate any act of a political subdivision which it could have originally authorized, Petitioner construes Section 2 of the Act of 1963 as *retrospectively* creating an obligation on Respondent to pay for such encasement. Respondent recognizes this general rule as to the power of the Legislature, but such power is subject to numerous constitutional limitations which, assuming the correctness of Petitioner's interpretation, renders Section 2 void.

The Constitution of Texas, Article III, Sections 51, 52, 53 and 55,[2] prohibits the Legislature from authorizing any county to lend its credit, grant public money or thing of value to a corporation, grant extra compensation after service has been rendered or a contract has been performed in whole or in part, or pay any claim created under any contract made without authority of law. To construe Section 2 as imposing a retrospective obligation on Respondent to pay Petitioner's claim under the void contracts would *authorize payment of a claim created under a contract made without authority of law and constitute a grant of public money to a corporation.*

A. Tex. Const. Section 53, Article III.

This section provides:

> "*The Legislature shall have no power to* grant, or to authorize any county or municipal authority to grant, any extra compensation, fee or allowance to a public officer, agent, servant or contractor, after service has been rendered, or a contract has been entered into, and performed in whole or in part; nor pay, nor *authorize*

[2] Quoted in Appendix, pp. 1a-4a.

the payment of, any claim created against any county or municipality of the State, under any agreement or contract, made without authority of law."

The court below held that Respondent did not have power to make the contracts relied upon by Petitioner. The claim of Petitioner for payment is thus a claim against a county under a contract *made without authority of law.* Under the express and mandatory language of Section 53, the Legislature has no power, by validating act or otherwise, to authorize payment of a claim against Respondent, a county, under any agreement "made without authority of law." An attempt to validate or ratify the contract is nothing but an authorization to pay a claim in violation of Section 53. *Empire Gas & Fuel Co.* v. *State*, 47 S.W. 2d 265 (Tex. Sup. 1932); *Ussery* v. *City of Laredo*, 65 Tex. 406 (1886); *State* v. *Haldeman*, 163 S.W. 1020 (Tex. Civ. App. 1913, error ref.); *Shelby County* v. *Gibson*, 44 S.W. 302 (Tex. Civ. App. 1898, error ref.).

Although all of these authorities do not directly construe the prohibition against authorizing payment of a claim created under a contract made without authority of law, they illustrate the strict construction applied to Section 53, and the cases construing Tex. Const. Section 44, Article III, providing a similar prohibition as to claims against the State, manifest that Petitioner's construction of Section 2 of the Act of 1963 violates Section 53.

B. Tex. Const. Section 44, Article III.

Section 53, Article III "places similar restrictions on the Legislature with respect to counties and municipal corporations as is placed by Section 44, Article III[3] on the state as to state officers and contractors and state claims." Interpre-

[3] See Appendix, p. 1a.

tative Commentary, Vernon's Texas Constitution, Volume 1, page 736, Section 44 provides in pertinent part:

> "The Legislature * * * shall not * * * grant, by appropriation or otherwise, any amount of money out of the Treasury of the State, to any individual, on a claim, real or pretended, when the same shall not have been provided for by pre-existing law; * * *."

Comparison of Section 44 and Section 53 shows that each, in different language, has the common purpose of prohibiting the Legislature from paying, or authorizing payment, of any claim against the State or a county which is founded on a contract, or other alleged obligation, made without authority of statutory or common law. *Fort Worth Cavalry Club, Inc.* v. *Sheppard*, 83 S.W. 2d 660 (Tex. Sup. 1935); *Austin Nat. Bank* v. *Sheppard*, 71 S.W. 2d 242 (Tex. Sup. 1934); *Corsicana Cotton Mills, Inc.* v. *Sheppard*, 71 S.W. 2d 247 (Tex. Sup. 1934); *Empire Gas & Fuel Co.* v. *State*, 47 S.W. 2d 265 (Tex. Sup. 1932); *State* v. *Wilson*, 9 S.W. 155 (Tex. Sup. 1888); *Matkins* v. *State*, 123 S.W. 2d 953 (Tex. Civ. App. 1939, error dism.); *State* v. *Haldeman*, 163 S.W. 1020 (Tex. Civ. App. 1913, error ref.).

The meaning of Section 44 is declared in *Austin Nat. Bank*:

> "By its express words the constitutional provision under consideration in no uncertain terms prohibits the Legislature from appropriating state money to 'any individual' unless such appropriation shall have been provided for by a 'pre-existing law.' We interpret this to mean that the *Legislature cannot appropriate state money to 'any individual' unless, at the very time the appropriation is made, there is already in force some valid law constituting the claim the appropriation is made to pay a legal and valid obligation of the state. By legal obligation is meant such an obligation as would*

> *form the basis of a judgment against the state in a court of competent jurisdiction in the event it should permit itself to be sued.*" (Emphasis supplied)

These authorities make it clear that the prohibitions against the Legislature paying any claim "when the same shall not have been provided for by pre-existing law" or paying or authorizing the payment of any claim created against any county "under any agreement or contract, made without authority of law", have the same meaning — the Legislature is prohibited from paying or authorizing payment of any claim which did not constitute a legal obligation at the time of its creation. Respondent's alleged contracts were made without authority of law and created no legal obligation against Respondent. Applying the authorities construing Section 44 to the language of Section 53 having the same purpose, it is manifest that Section 2 of the Act of 1963 is void insofar as it attempts to authorize payment of Petitioner's claim.

C. Tex. Const., Article III, Section 52.

This Section provides in pertinent part:

> "The Legislature shall have no power to authorize any county, city, town or political corporation or subdivision of the State, * * * to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever * * *."

The Legislature "shall have no power to authorize any county . . . to grant public money or thing of value in aid of or to any . . . corporation whatsoever." To construe the Act of 1963 as compelling Respondent to pay Petitioner under an agreement *creating no liability* would authorize a grant of public money to a corporation in violation of this section. *Tompkins* v. *Williams*, 62 S.W. 2d 70 (Tex.

Comm. App. 1933). The governing body of the City of Dallas ordered the City Auditor to pay Mrs. Williams damages for injuries sustained when she was struck by a motorcycle ridden by a city policeman. Upon the auditor's refusal, Mrs. Williams sought a writ of mandamus. Holding that the injuries resulted from a governmental function of the city, the court denied the claim, saying:

> "It is the settled law of this state that a city is not liable for injuries inflicted through the negligence of its officers and employees in the exercise of governmental functions. City of Wichita Falls v. Robison (Tex. Sup.) 46 S.W. (2d) 965 and authorities there cited. It follows that there was absolutely no consideration for the entry of the order of December 21, 1928, ordering the payment of this claim. *In other words, the payment of this claim would have constituted, in so far as any legal liability was concerned, a pure gift or donation. Such would be in violation of sections 51 and 52 of article 3 of our state Constitution.*" (Emphasis supplied).

Inasmuch as Respondent is not liable under the alleged agreements, if the Act of 1963 is construed to compel payment thereunder, the payment would be "a pure gift or donation . . . in violation of Sections 51 and 52 of Article 3 of our state Constitution."

D. Tex. Const., Section 55, Article III.

This Section provides in part:

> "The Legislature shall have no power to release or extinguish, or to authorize the releasing or extinguishing, in whole or in part, the indebtedness, liability or obligation of any corporation or individual, to this State or to any county or defined subdivison thereof, or other municipal corporation therein, * * *."

This section is the converse of Sections 44 and 53. These sections prohibit the payment of any claim which is not a

legal obligation, and Section 55 prohibits the release of any obligation to the State or political subdivision. The judicial construction of Section 55 proves that the Legislature can neither release an obligation to a county or create an obligation against the county under a contract made without authority of law. *State* v. *City of Austin*, 331 S.W. 2d 737 (Tex. Sup. 1960); *Empire Gas & Fuel Co.* v. *State*, 47 S.W. 2d 265 (Tex. Sup. 1932); and *Ollivier* v. *City of Houston*, 54 S.W. 943 (Tex. Sup. 1900).

In *State* v. *City of Austin* (belatedly relied upon by Petitioner) the State contended that Vernon's Ann. Civ. Stat., Article 6674w-4, authorizing the State to pay for relocation of utilities on *interstate* highways, was a release of an obligation in violation of Article III, Section 55, and a grant of public money in violation of Section 51, Article III. The Texas Supreme Court held that, since the statute operated *prospectively*, it was not subject to these objections, but that if it had operated *retrospectively*, it would be void, saying:

> "Many city ordinances as well as several of our statutes authorizing utility companies and municipal corporations to erect their lines along and upon public roads and streets stipulate that the owner of the facility may be required to relocate the same at its own expense so as to permit road and street improvements. See Articles 1433, 1433a, 1436a, and 1436b, Vernon's Ann. Tex. Civ. Stat. These statutes and ordinances express the public policy of the state as it existed at the time of their adoption. Subject to constitutional limitations, however, that policy may be changed by the Legislature at any time.
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> • • •
>
> *After the occurrence of events which under the law then existing give rise to an obligation on the part of an individual or corporation to the state, the Legislature has no power to release or diminish that obligation without consideration.* Empire Gas & Fuel Co. v. State,

121 Tex. 138, 47 S.W. 2d 265. See also Delta County v. Blackburn, 100 Tex. 51, 93 S.W. 419. *Moreover, the use of public money to pay a claim predicated on facts which generate no state liability constitutes a gift or donation in violation of our Constitution.* See Tompkins v. Williams, Tex. Com. App., 62 S.W. 2d 70. Respondents could not, therefore, be reimbursed for all or any part of the expense incurred by them in relocating their lines prior to the adoption of House Bill 179. But the statute does not operate *retrospectively*, and respondents claim no right to reimbursement for costs incurred before it became effective.

* * *

"Respondents benefit from the statute only in the sense that they are relieved of a financial burden which they could be required to bear. The question to be decided then is whether the use of public funds to pay part or all of the loss or expense to which an individual or corporation is subjected by the state in the exercise of its police power is an unconstitutional donation for a private purpose. *We think not provided the statute creating the right of reimbursement operates prospectively*, deals with the matter in which the public has a real and legitimate interest, and is not fraudulent, arbitrary or capricious." (Emphasis supplied).

As construed by Petitioner, Section 2 of the Act of 1963 purports to operate *retrospectively* to create an obligation against Respondent and requires the donation of public funds. The inescapable conclusion is that, if Section 2 of the Act of 1963 is construed, as Petitioner urges, to impose an obligation on Respondent to pay a claim created under the contracts made without authority of law, it is void.

II.

PETITIONER'S CONSTRUCTION OF THE ACT IS ERRONEOUS

Petitioner finds an intent in Sections 1 and 2 of the Act of 1963 which eludes Respondent. Section 1 does not provide that the cost of relocating or adjusting utility facilities

under contracts by counties to pay for such cost is declared to be an expense of right-of-way acquisition, but states that *in the acquisition of highway rights-of-way for the Texas Highway Department*, such cost is declared to be an expense of the right-of-way acquisition. Payment of the cost of utility adjustment as an incident of acquiring the utility's easement is not payment of the cost of utility adjustment under a contract providing for that alone. The Department did not request Respondent to purchase or condemn Petitioner's easements, and Respondent made no effort to acquire such easements (R. 66). Under these facts, Sections 1 and 2 are not applicable.

The only cost declared to be an expense of right-of-way acquisition is that "which . . . may be eligible under the law." When is a cost eligible under the law? The only reference in previous statutes to a cost being eligible is in Vernon's Ann. Civ. Stat. Article 6674w-4, providing that the relocation of a utility on an *interstate highway* shall be made "at the cost and expense of the State of Texas provided that such relocation is eligible for Federal participation." *State* v. *City of Austin*, 331 S.W. 2d 737 (Tex. Sup. 1960). The highways involved here were not a part of the Federal or Interstate Highway System. Moreover, Vernon's Ann. Civ. Stat., Article 1436b[4] requires a utility to relocate its pipes on new right-of-way at its own expense.

Section 2 states that contracts made by counties "for the purposes stated above" are ratified and validated. The only purpose "stated above" is the acquisition of highway rights-of-way. Section 1 makes no reference to a contract relating only to the payment of the cost of utility relocation or adjustment.

Petitioner assumes a meaning not in the Act and predicates its entire reply brief on such assumption.

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[4] Brief in Opposition, Appendix A, pp. 33, 34.

III.

EMERGENCY CLAUSE OF ACT OF 1963

Section 4 of the Act finds an emergency from "the fact that the provisions of this act are necessary in order to clarify existing law." Petitioner urges that this "shows the law of the State of Texas existing at the time of the Court of Appeals' decision." In Texas, "a legislative construction is not controlling; on the other hand, it is entitled to very little weight," *City of Waco* v. *McCraw*, 93 S.W. 2d 717, 719 (Tex. Sup. 1936), "a legislative construction of an act of another legislature is uniformly held to be entitled to little weight," *Federal Crude Oil Co.* v. *Yount-Lee Oil Co.*, 52 S.W. 2d 56, 63 (Tex. Sup. 1932), and "a legislature may not construe a former law so as to give such construction a retroactive operation," *Snyder* v. *Compton*, 28 S.W. 1061 (Tex. Sup. 1894).

CONCLUSION

For the foregoing reasons and the reasons stated in the Brief in Opposition, Respondent submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel for Respondent, Hardin County, a member of the Bar of the Supreme Court of the United States, certifies that a copy of the foregoing brief has been served upon Petitioner, Trunkline Gas Company, by delivering same to Mr. Cecil N. Cook, 1100 Esperson Building, Houston 2, Texas, Counsel for Petitioner, in person, this ..... day of July, 1963.

.....

William Robert Smith

Counsel for Respondent

APPENDIX

Constitutional Provisions

Tex. Const. Art. III, Sec. 44 (Revised Civil Statutes of Texas of 1925, Vol. I, p. XXVI)

The Legislature shall provide by law for the compensation of all officers, servants, agents and public contractors, not provided for in this Constitution, but shall not grant extra compensation to any officer, agent, servant, or public contractors, after such public service shall have been performed or contract entered into, for the performance of the same; nor grant, by appropriation or otherwise, any amount of money out of the Treasury of the State, to any individual, on a claim, real or pretended, when the same shall not have been provided for by pre-existing law; nor employ any one in the name of the State, unless authorized by pre-existing law.

Tex. Const. Art. III, Sec. 51 (Revised Civil Statutes of Texas of 1925, Vol. I, p. XVII)

The Legislature shall have no power to make any grant or authorize the making of any grant of public moneys to any individual, association of individuals, municipal or other corporations whatsoever; provided, however, the Legislature may grant aid to indigent and disabled Confederate soldiers and sailors under such regulations and limitations as may be deemed by the Legislature as expedient, and to their widows in indigent circumstances under such regulations and limitations as may be deemed by the Legislature as expedient; to indigent and disabled soldiers, who, under special laws of the State of Texas, during the war between the States, served in organizations for the protection of the frontier against Indian raids or Mexican marauders, and to indigent and disabled soldiers of the

militia who were in active service during the war between the States, and to the widows of such soldiers who are in indigent circumstances, and who are or may be eligible to receive aid under such regulations and limitations as may be deemed by the Legislature as expedient; and also grant for the establishment and maintenance of a home for said soldiers and sailors, their wives and widows and women who aided in the Confederacy, under such regulations and limitations as may be provided for by law; provided the Legislature may provide for husband and wife to remain together in the home. There is hereby levied in addition to all other taxes heretofore permitted by the Constitution of Texas, a State ad valorem tax on property of seven ($.07) cents on the one hundred ($100) dollars valuation for the purpose of creating a special fund for the payment of pensions for services in the Confederate army and navy, frontier organizations and the militia of the State of Texas, and for the widows of such soldiers serving in said armies, navies, organizations or militia; provided that the Legislature may reduce the tax rate herein levied, and provided further, that the provisions of this section shall not be construed so as to prevent the grant of aid in cases of public calamity.

Tex. Const. Art. III, Sec. 52 (Revised Civil Statutes of Texas of 1925, Vol. I, p. XXVIII)

The Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company; provided, however, that under legislative provision any county, any political subdivision of a county, any number of adjoining counties, or any political subdivision of the State, or any

defined district now or hereafter to be described and defined within the State of Texas, and which may or may not include, towns, villages or municipal corporations, upon a vote of a two thirds majority of the resident property taxpayers voting thereon who are qualified electors of such district or territory to be affected thereby, in addition to all other debts, may issue bonds or otherwise lend its credit in any amount not to exceed one-fourth of the assessed valuation of the real property of such district or territory, except that the total bonded indebtedness of any city or town shall never exceed the limits imposed by other provisions of this Constitution, and levy and collect such taxes to pay the interest thereon and provide a sinking fund for the redemption thereof, as the Legislature may authorize, and in such manner as it may authorize the same, for the following purposes to wit:

(a) The improvement of rivers, creeks, and streams to prevent overflows, and to permit of navigation thereof, or irrigation thereof, or in aid of such purposes.

(b) The construction and maintenance of pools, lakes, reservoirs, dams, canals and waterways for the purposes of irrigation, drainage or navigation, or in aid thereof.

(c) The construction, maintenance and operation of macadamized, graveled or paved roads and turnpikes, or in aid thereof.

Tex. Const. Art. III, Sec. 53 (Revised Civil Statutes of Texas of 1925, Vol. I, p. XXVIII)

The Legislature shall have no power to grant, or to authorize any county or municipal authority to grant, any extra compensation, fee or allowance to a public officer, agent, servant or contractor, after service has been rendered, or a contract has been entered into, and performed in whole or in part; nor pay, nor authorize the payment

of, any claim created against any county or municipality of the State, under any agreement or contract, made without authority of law.

Tex. Const. Art. III, Sec. 55 (Revised Civil Statutes of Texas of 1925, Vol. I, p. XXVIII)

The Legislature shall have no power to release or extinguish, or to authorize the releasing or extinguishing, in whole or in part, the indebtedness, liability or obligation of any corporation or individual, to this State or to any county or defined subdivision thereof, or other municipal corporation therein, except delinquent taxes which have been due for a period of at least ten years.

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